No. 11768.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TREASURE COMPANY, a corporation, and SAMARKAND OIL COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

BODKIN, BRESLIN & LUDDY, and
E. E. HITCHCOCK,
1225 Citizens National Bank Building, Los Angeles 13,
Attorneys for Appellants.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX

PAGE

I.

Jurisdiction 1

District Court 1

United States Circuit Court of Appeals 1

II.

Statement of case 2

III.

Specification of errors 10

IV.

Argument 11

Summary of points relied upon 11

(1) The United States District Court has jurisdiction to dissolve an injunction if the court is convinced that it was improvidently granted in the first instance, though there has been no change in circumstances since the injunction was granted 14

(2) An order refusing to dissolve an injunction is appealable either under 28 U. S. C. A.-227, or under Section 963 of the Code of Civil Procedure of the State of California 19

(3) An order of a District Court granting or vacating, or refusing to vacate, an injunction, may be reversed if the court abused its discretion in so doing, or it appears that there has been a disregard for established principles of law 22

PAGE

(4) The United States District Court abused its discretion and disregarded established principles of law in refusing to dissolve its injunction previously given, because by such refusal it denied to these appellants all recourse for the wrongful taking of said appellants' personal property on September 28, 1942, its detention thereafter, its subsequent deterioration, and for the value of its use from September 28, 1942, until January 12, 1944, for the following reasons 23

(a) The machinery and equipment described in the state court actions being personal property as between the respondent Government and these appellants, the District Court acquired no jurisdiction over the personal property described in said state court actions until the filing of the amended complaint on January 12, 1944, by which a new cause of action was stated by which it was first sought to condemn said personal property, and therefore, no award can be made to these appellants in the condemnation action for the use and deterioration in value of the personal property between the filing of the original complaint on September 28, 1942, and the filing of pleading designated an amended complaint, which was in fact a supplemental complaint, on January 12, 1944..... 23

(1) The taking and retention of the personal property of appellants by Union Oil Company of California was unauthorized and unlawful and even though said corporation claimed to be acting for appellee, still a cause of action immediately arose in favor of appellants for such unlawful taking and retention..... 23

PAGE

(2) The filing of the amended complaint in the condemnation action seeking to condemn the personal property did not constitute a ratification of the original wrongful taking by the individual acting as United States Marshal nor of the wrongful retention thereof by the Union Oil Company 27

(3) The machinery and equipment referred to in the exhibit attached to the amended complaint [Tr. p. 84], is personal property as between the appellee and the appellants and therefore did not become subject to condemnation in the above entitled action until the filing of the amended complaint on January 12, 1944..... 28

(4) This court acquired no jurisdiction over the personal property described in the state court action until the filing of the amended complaint on January 12, 1944..... 32

(5) The court having acquired jurisdiction of the machinery and equipment on January 12, 1944, the award which may be made in the present action is limited to the value of the machinery and equipment on January 12, 1944..... 39

(6) The only recovery that can be had by the appellants Treasure Company and Samarkand Oil Company in the condemantion action in respect to the taking of personal property is the value of the personal property at the time of the filing of the amended complaint on January 12, 1944, whereby it was sought for the first time to condemn the personal property..... 41

PAGE

(b) Although the so-called amended complaint in the condemnation action was filed January 12, 1944, whereby it was sought to condemn the personal property described in the state court actions, the commencement of the state court actions on September 27, 1945, and the maintenance thereof do not constitute a violation of the rule that the court which first acquires jurisdiction in an action in rem is entitled to retain exclusive jurisdiction of such action, because the state court actions in so far as they seek to recover the value of the loss of the use and of the depreciation in value of such personal property are actions in personam rather than actions in rem, and the District Court is without jurisdiction to grant relief for the unlawful taking and detention of such personal property..... 43

(1) The right of the federal court to retain exclusive jurisdiction first acquired to the exclusion of the state court is confined to cases in which the actions in both the state and federal courts are actions in rem..... 43

(c) The conclusions of the court and its decisions on the motion for injunction rendered herein by the Honorable Paul J. McCormick of the United States District Court on June 12, 1945, and the findings of fact, conclusions of law and judgment rendered by Judge William J. Palmer on October 24, 1945, in state court actions 489318 and 489319, are res adjudicata in this action, in so far as they determine that the personal property of appellants taken on September 28, 1942, was wrongfully taken and that such wrongful taking has never been ratified by the respondent government or any agency thereof..... 45

PAGE

(d) The determination by the Circuit Court of Appeals in this condemnation proceeding, in United States v. Samuel Block, 160 F. (2d) 604, that the award made for the taking of personal property in connection with condemnation proceedings must be predicated upon the value of the property when it is first lawfully taken pursuant to such proceedings, is the law of the case..... 57

(e) The prosecution of the state court actions will in no wise interfere with the jurisdiction of the District Court to proceed to trial and to make an award to these appellants for the value of their leasehold interest in the real property and the value of their personal property at the time of the filing of the amended complaint in the condemnation action on January 12, 1944..... 61

(1) On March 10, 1945, the respondent in the condemnation action filed a petition for an injunction to restrain the defendant Treasure Company from prosecuting action No. 489-318 and to restrain Samarkand Oil Company from prosecuting action No. 489-319 which cases were then pending in the Superior Court of the State of California in and for the County of Los Angeles. By said actions the respective plaintiffs therein sought to recover possession of certain personal property consisting of oil drilling equipment or the value thereof if possession could not be had. The personal property sought to be recovered in the last mentioned actions were personal property other than that described and involved in actions Nos. 505-967 and 505-968 but such personal property was

PAGE

wrongfully taken by the individual acting as United States Marshal and wrongfully retained by the Union Oil Company under the same circumstances and under the same untenable claim of authority which obtains in respect to actions Nos. 505-967 and 505-968..... 61

(2) It no doubt will be contended that appellants are estopped by their conduct from maintaining the state actions..... 66

(f) Defendant Treasure Company having the right to remove improvements put on the land covered by its lease, it was not entitled to recover compensation for such improvements in this condemnation action, until the supplemental or amended complaint was filed.... 68

(g) The provisions of Section 265 of the Federal Judicial Code (28 U. S. C. A. 379) renders the granting of the injunction in this case erroneous, an abuse of discretion, and a violation of established principles of law, and therefore, said order refusing to vacate said injunction should be reversed..... 70

Conclusion 72

TABLE OF AUTHORITIES CITED

Cases	Page
Acquisition of Certain Property on North River, In re, 103 N. Y. Supp. 908	69
Adams v. Hoskins, 144 Cal. 19	27
American Ins. Co. v. Scheufler, 129 F. (2d) 143	14
Barker v. Kansas City, 70 P. (2d) 5	42
Brazos River Con. etc. Dist. v. Adkisson, 173 S. W. (2d) 294	46
Carothers, Estate of, 168 Cal. 691	60
Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 216 Ind. 573, 25 N. E. (2d) 444	29
City of Los Angeles v. Glassell, 203 Cal. 44	38, 41
Clay County Court v. Baker, 241 S. W. 447	44
Consolidated Ice Co. v. Pennsylvania Railroad Co., 73 Atl. 937	31
De Gear v. McLean, 56 Cal. App. (2d) 382	60
Futrovsky v. United States, 66 F. (2d) 215	29
Harrington v. Superior Court, 194 Cal. 185	59
Housing Authority v. Forbes, 51 Cal. App. (2d) 1	44
Indiana Quartered Oak Co. v. Federal Trade Com., 58 F. (2d) 182	17
Johnson v. Fontana County Fire Pro. District, 15 Cal. (2d) 380	55
Loomis v. City of Augusta, 99 P. (2d) 988	40
McKnight v. Gelzean, 29 Cal. App. (2d) 218	28
Merchants Nat. Bank v. Bentel, 166 Cal. 473	38
Moore v. Carey, 39 A. L. R. 1247	30
Nichols v. City of Cleveland, 135 N. E. 291	40
Nisonoff v. Irving Trust Co., 68 F. (2d) 32	22
Pearl River-Nanuet Highway No. 9006, In re, 291 N. Y. S. 846	37
People v. Church, 57 Cal. App. (2d) Supp. 1032	28
Potomac Electric Power Co. v. United States, 85 F. (2d) 243	29
Princess Lida v. Thompson, 83 L. Ed. 285	44

PAGE

Puget Sound Power & Light Co. v. Asia, 2 F. (2d) 485..... 21
Rideaux v. Torgrimson, 39 Cal. App. (2d) 273..... 38
San Diego Trust and Savings Bank v. San Diego, 16 Cal. (2d) 142 29
Security-First National Bank v. Marxen, 19 Cal. (2d) 100..... 59
Sink v. Mutual Life Ins. Co. of New York, 56 Fed. Supp. 306.... 38
Southern Railway Company v. Painter, 314 U. S. 155, 86 L. Ed. 116 71
Todhunter v. Smith, 219 Cal. 692..... 56
Toucey v. New York Life Ins. Co., 86 L. Ed. 100.....43, 70
United Natural Gas Co. v. James Bros. Lumber Co., 191 Atl. 12 29
United States v. Bauman, 56 Fed. Supp. 109.....34, 36
United States v. Miller, 87 L. Ed. 336..... 39
United States v. North American Transportation & Trading Co., 64 L. Ed. 935.....40, 42
United States v. Samuel Block, 160 F. (2d) 604.....13, 18, 57, 59, 60
Valensin v. Valensin, 73 Cal. 106..... 38
Westerly Waterworks v. Town of Westerly, 77 Fed. 783..... 16
Western Union Tel. Co. v. Louisville & N. R. Co., 201 Fed. 919 20
Whitlock Avenue v. City of New York, 16 N. E. (2d) 281..... 29
Witham Const. Co. v. Remer, 105 F. (2d) 371..... 38

STATUTES

Civil Code, Sec. 658..... 35
Civil Code, Sec. 659 .....35, 36
Civil Code, Sec. 660 .....35, 36
Code of Civil Procedure, Sec. 963.....1, 11, 19, 20, 21
Code of Civil Procedure, Sec. 1249..... 42
Code of Civil Procedure, Sec. 1908..... 54

PAGE

Executive Order 9217 (Aug. 7, 1942) 1, 2
Federal Rules of Civil Procedure, Rule 81-a-7 19
Federal Rules of Civil Procedure, Sec. 15, Subd. (c) 37
Judicial Code, Sec. 265 (28 U. S. C. A. 379) 13, 70, 71
Reconstruction Finance Corporation Act, Sec. 5d(5) (15 U. S. C. 601-617), amended Mar. 27, 1942 (Pub. Law 507, 77th Cong.) 1, 2
Second War Powers Act, Title II (Sec. 2, U. S. C. A. 632) 41
United States Code, Title 28, Sec. 227 ..... 1, 11, 19, 20, 21
United States Code, Title 28, Sec. 723(c) 19, 37
United States Code, Title 40, Sec. 258 ..... 19, 20

No. 11768.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TREASURE COMPANY, a corporation, and SAMARKAND OIL COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

I.

Jurisdiction.

DISTRICT COURT.

The action in which the proceedings culminating in the order appealed from arose, was an action by the United States to condemn land in Los Angeles County, State of California, under authority of Section 5d(5) of the Reconstruction Finance Corporation Act (15 U. S. C. 601-617) as amended by the Act of Congress approved March 27, 1942 (Public Law 507, 77th Congress), and Executive Order 9217, issued by the President of the United States on August 7, 1942, which Acts and Executive Order authorized the Reconstruction Finance Corporation to acquire and dispose of property deemed necessary for military, naval and other war purposes.

UNITED STATES CIRCUIT COURT OF APPEALS.

An order refusing to dissolve an injunction is appealable either under Section 227 of Title 28, U. S. C., or under Section 963 of the Code of Civil Procedure of the State of California.

II.

Statement of Case.

This is an appeal from an order made by Honorable C. E. Beaumont, refusing to dissolve and vacate an interlocutory injunction, which enjoined appellants from proceeding with the trial of certain actions in the Superior Court of Los Angeles County against Union Oil Company, a corporation, to recover certain personal property or damages for its taking and withholding.

On September 28, 1942, appellee, acting on behalf of Reconstruction Finance Corporation, a federal corporation, acting in behalf of Defense Plant Corporation, a federal corporation, filed action No. 2454-B seeking to condemn certain pieces and parcels of land situate in the City of Los Angeles, particularly described in the complaint. [Tr. p. 7, fol. 5.] That said land was sought to be condemned for "the establishment of a reservoir for the storing and conservation of natural gas." [Tr. p. 5, fol. 4.]

The action was commenced in accordance with subparagraph (5) of Section 5d of the Reconstruction Finance Corporation Act (Act. U. S. C. 601-617) as amended by Act of Congress approved March 27, 1942 (Public Law 507, 77th Congress) and Executive Order No. 9217. Public Law 507 is generally known as the Second War Powers Act and is in so far as applicable, as follows:

> "'Sec. 2. *The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President,* may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real

property, * * * together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, * * * *Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act (this section and section 171 of Title 50), notwithstanding any other law.* * *" (Italics ours.)

Executive Order 9217 is as follows:

"By virtue of and pursuant to the authority vested in me by Title II of the Second War Powers Act, 1942, approved March 27, 1942 (Public Law 507, 77th Congress) (section 171 note and section 632 of this Appendix), the *Reconstruction Finance Corporation is hereby authorized to exercise the authority contained in the said Title II of the Second War Powers Act,* 1942 (section 171, note and section 632 of this Appendix), to acquire, use, and dispose of any real property, temporary use thereof, or other interest therein, together with any personal property located thereon, or used therewith, that the Corporation shall deem necessary for military, naval or other war purposes." (Italics ours.)

This is the law which gave Reconstruction Finance Corporation and the United States Government the right to act, and it is under such law that we must determine the legality of their acts.

On September 18, 1942, Reconstruction Finance Corporation, pursuant to the authority granted to it by the aforesaid executive order, adopted a resolution which provided for the taking of land only. (Tr. p. 220, fol. 31.] The resolution is attached to the original complaint,

is set forth in full at Tr. p. 72, and its adoption is admitted. It directed the Attorney General to file suit to condemn said land, and pursuant thereto suit to condemn land was filed September 28, 1942. Upon filing of the suit, there was filed a declaration of taking of land [Tr. pp. 20 and 21] and an order of taking was made by Judge Beaumont, which likewise only authorized the taking of land. On September 28, 1942, Judge Beaumont signed an order for immediate possession which authorized taking possession of land only. [Tr. p. 14, fol 12, to p. 19, fol. 16.] This order directed the United States Marshall to post a notice of the taking of such land.

The Union Oil Company, a corporation, was designated agent of Defense Plant Corporation to take possession of such land. [Tr. p. 67.] Notwithstanding the fact that the resolution of taking and the order for immediate possession only referred to land, Defense Plant Corporation directed its agent, Union Oil Company, to take possession of all personal property on the land and to make an inventory thereof. [Tr. p. 67, par. II.] Pursuant thereto, Union Oil Company entered into possession of the real and personal property of appellants and took an inventory of the personal property. This inventory is headed:

> "INVENTORY OF THE PROPERTY AND EQUIPMENT REFERRED TO IN PARAGRAPHS XIII, XIV AND XV OF THE FIRST AMENDED COMPLAINT FILED HEREIN, AND WHICH IS TO BE ACQUIRED BY CONDEMNATION IN THE ABOVE ENTITLED ACTION. (80)"

In such inventory appears a list of items headed "Items Deleted from Original Inventory as Indicated as Not Being Needed in Playa Del Rey Project" [Tr. pp. 97 to 100, incl.], in reference to appellant Samarkand's prop-

erty and as to Treasure Company's property at transcript pages 108 to 118 inclusive.

After Defense Plant Corporation and its agent, Union Oil Company, were unlawfully in possession of the personal property of appellants since September 28, 1942, in spite of appellants' protests, in the month of October, 1943, Reconstruction Finance Corporation passed an amendatory resolution for the taking of defendants' personal property, but by such action Reconstruction Finance Corporation did not expressly ratify the unlawful taking, even if it had such powers. It merely resolved:

> "Resolved herewith, That it is necessary and advantageous in carrying out the authority vested in Defense Plant Corporation to acquire by condemnation the machinery and equipment described in said Exhibit "C." [Tr. p. 81.]

This Exhibit "C" contained a list of the personal property of appellants, which had theretofor been unlawfully taken, under the headings hereinbefore set forth. The foregoing resolution speaks of Defense Plant Corporation's authority to acquire property by condemnation. In so far as the Second War Powers Act and resolutions pursuant thereto are concerned, and federal law generally, it is sufficient to say that Defense Plant Corporation was never given authority to take property for war purposes.

In November, 1943, appellants filed separate actions against Union Oil Company in the Los Angeles Superior Court to recover certain of the personal property unlawfully taken and withheld. Defense Plant Corporation intervened in said actions.

On January 12, 1944, an amended complaint in condemnation was filed in Action 2454-B in which it was

sought to condemn all of appellants' personal property, both that deemed necessary and that not deemed necessary for the project, by Union Oil Company, its operating agent. [Tr. pp. 37 to 46, incl.] Appellants filed their answers thereto. [Tr. pp. 47 to 51, incl.]

The answers said in part:

> "That said personal property so belonging to Samarkand Oil Company, a corporation, was on September 28, 1942 unlawfully taken by the United States of America, Reconstruction Finance Corporation, a Federal Corporation, and Defense Plant Corporation, a Federal Corporation, and their agents, and that said material and supplies, personal property and improvements were on the 28th day of September, 1942, of the reasonable value of $261,104.14, and the United States of America, Reconstruction Finance Corporation, a Federal Corporation and Defense Plant Corporation, a Federal Corporation, and their agents, at all times since said 28th day of September, 1942, so unlawfully retain possession of said property."

The agents referred to were Union Oil Company and its employees.

Defense Plant Corporation sought to abate the State Court actions against Union Oil Company filed November 15, 1943, in which it intervened, but was unsuccessful in so doing. [Tr. pp. 155 to 161, incl.] The opinion of Judge Palmer is carefully considered and he denied the motion to abate.

Thereupon, appellee, by motion in action No. 2454-B, sought to enjoin appellants herein from proceeding with the trial of said actions in the State Court. During Judge

Beaumont's absence, to whom the case was regularly assigned, Judge McCormick heard the motion.

After lengthy argument, Judge McCormick denied it *in toto*. A copy of his well considered decision will be found at transcript pages 52 to 63, inclusive.

As we contend that Judge McCormick's decision is the law of the case, it is necessary that the decision be carefully studied.

Judge McCormick said in part at page 53:

> "Notwithstanding the limitations of the order for possession, the seizure made by the Government on September 28, 1942, included personal property, as well as real property, of the Treasure Company and Samarkand Oil Company, the two defendants in this action that are resisting the instant motion for injunction.
>
> "The purpose of the acquisition of the subject properties was to provide gas storage facilities for defense needs on the site of depleted oil wells. However, the record discloses that personal property not affixed to the realty was seized by the agents of the Government and that, also, a producing oil well is now in the hands of the Government agents."

Again, at page 61, transcript, Judge McCormick said:

> "The fair preponderance of the evidence before us establishes, we think, that the present claim that it was the intention from the inception of the project to acquire the personalty is an afterthought conceived to avoid possible consequences of the seizure of September 28, 1942."

An appeal was taken by the Government from Judge McCormick's decision but was later dismissed. Thereupon, the State Court actions proceeded to trial. Both Reconstruction Finance Corporation and Union Oil Company were

parties to such action, the first as intervenor, the latter as party defendant. Judgment was rendered for appellants herein in both actions. The written decision of Judge Palmer will be found at transcript pages 162 to 170, inclusive. Findings of Fact and Conclusions of Law and Judgment in the case of appellant Treasure Company will be found at transcript pages 135 to 151, inclusive. A similar Finding and Judgment was entered in appellant Samarkand's case.

These judgments have long since become final.

Defense Plant Corporation was a party to the motion before Judge McCormick and to the cases tried before Judge Palmer.

Defense Plant Corporation is also a party to the present proceeding.

The law laid down by Judge McCormick and Judge Palmer is binding and conclusive on appellee herein.

After the determination of said State actions, appellants filed two additional State actions each, one of such actions on behalf of each appellant against Union Oil Company, a corporation, being to recover personal property consisting of oil equipment not covered by the original actions or its value and damages for its withholding. Service was made upon Union Oil Company and it filed its answers to such suits.

Thereafter, appellee served and filed a petition for injunction against appellants in the United States District Court seeking to enjoin appellants from proceeding with the trial of said State actions against Union Oil Company. [Tr. pp. 66 to 118, incl.] At the same time, appellee caused to be served and filed a notice of motion for injunction. [Tr. pp. 119 to 121, incl.] Appellants filed

their answer thereto, which will be found at transcript pages 121 to 151, inclusive.

The motion came on for hearing on June 10, 1946. The record of this hearing will be found at transcript pages 197 to 266, inclusive.

During the proceedings, counsel for appellants informed the Court that there were two sets of actions pending in the State Court, one involving the taking of oil from the land of each appellant, and the other action involving personal property. That as to the two cases involving oil, it was not the intention of appellants to try such cases until after the determination of the condemnation suit. [Tr. p. 219.]

After submission and on January 27, 1947, a temporary injunction was issued by Judge Beaumont, enjoining and restraining appellants from proceeding with the trial of the two State actions involving personal property. Because of the statement of counsel that appellants did not intend to proceed with the cases involving the taking of oil, no order was made therein.

This order will be found at transcript pages 171 to 175, inclusive.

Thereafter, by stipulation, an order was made modifying the order of January 27, 1942, *nunc pro tunc,* to expressly provide that appellants are enjoined and restrained from proceeding further in said State Court actions involving personal property until the further order of the Court. This modifying order will be found at transcript pages 176 to 178.

Thereafter, appellants filed their written notices of motion to dissolve and vacate the interlocutory injunction granted January 27, 1947.

Said motion was made upon the ground that the order and decree was erroneously and improvidently made and granted and its continuance would work an unjust hardship upon appellants. Said motion was based upon the papers, files, and records in the condemnation suit, Reconstruction Finance Corporation resolution of September 18, 1942, original complaint in condemnation, order for immediate possession dated September 28, 1942, amendatory resolution of Reconstruction Finance Corporation of October 19, 1942, declaration of taking of October 26, 1942, amendatory resolution of Reconstruction Finance Corporation of October 4, 1943, first amended condemnation complaint, conclusions of law, and decision on injunction by Judge McCormick, and affidavit by G. de Bretteville. [Tr. pp. 179 to 185.]

This motion came on for hearing before Judge Beaumont and was resisted by counsel for appellee. The motion was denied. [Tr. p. 185.] This appeal was taken from such order so made. [Tr. p. 186.]

III.
Specification of Errors.

(1) The United States District Court erred in making said order of August 4, 1947, in that in making said order said Court abused its discretion and disregarded established principles of law in refusing to dissolve its injunction previously given, because by such refusal it denied to these appellants all recourse for the wrongful taking of said appellants' personal property on September 28, 1942, its detention thereafter, its subsequent deterioration, and for the value of its use from September 28, 1942, until January 12, 1944.

IV.
ARGUMENT.

Summary of Points Relied Upon.

(1) The United States District Court has jurisdiction to dissolve an injunction if the Court is convinced that it was improvidently granted in the first instance, though there has been no change in circumstances since the injunction was granted.

(2) An order refusing to dissolve an injunction is appealable either under 28 U. S. C. A. 227, or under Section 963 of the Code of Civil Procedure of the State of California.

(3) An order of a District Court granting or vacating, or refusing to vacate, an injunction, may be reversed if the Court abused its discretion in so doing, or it appears that there has been a disregard for established principles of law.

(4) The United States District Court abused its discretion and disregarded established principles of law in refusing to dissolve its injunction previously given, because by such refusal it denied to these appellants all recourse for the wrongful taking of said appellants' personal property on September 28, 1942, its detention thereafter, its subsequent deterioration, and for the value of its use from September 28, 1942, until January 12, 1944, for the following reasons:

(a) The machinery and equipment described in the State Court actions being personal property as between the respondent government and these appellants, the District Court acquired no jurisdiction over the personal property described in said State Court actions until the filing of the Amended Complaint on

January 12, 1944, by which a new cause of action was stated by which it was first sought to condemn said personal property, and therefore, no award can be made to these appellants in the condemnation action for the use and deterioration in value of the personal property between the filing of the original Complaint on September 28, 1942, and the filing of pleading designated an Amended Complaint, which was in fact a Supplemental Complaint, on January 12, 1944.

(b) Although the so-called Amended Complaint in the condemnation action was filed January 12, 1944, whereby it was sought to condemn the personal property described in the State Court actions, the commencement of the State Court actions on September 27, 1945, and the maintenance thereof do not constitute a violation of the rule that the Court which first acquires jurisdiction in an action *in rem* is entitled to retain exclusive jurisdiction of such action, because the State Court actions in so far as they seek to recover the value of the loss of the use and of the depreciation in value of such personal property are actions *in personam* rather than actions *in rem*, and the District Court is without jurisdiction to grant relief for the unlawful taking and detention of such personal property.

(c) The conclusions of the Court and its decisions on the Motion for Injunction rendered herein by the Honorable Paul J. McCormick of the United States District Court on June 12, 1945, and the Findings of Fact, Conclusions of Law and Judgment rendered by Judge William J. Palmer on October 24, 1945, in State Court actions 489318 and 489319, are *res ad-*

judicata in this action, in so far as they determine that the personal property of appellants taken on September 28, 1942, was wrongfully taken and that such wrongful taking has never been ratified by the respondent government or any agency thereof.

(d) The determination by the Circuit Court of Appeals in this condemnation proceeding, in *United States v. Samuel Block,* 160 F. (2d) 604, that the award made for the taking of personal property in connection with condemnation porceedings must be predicated upon the value of the property when it is first lawfully taken pursuant to such proceedings, is the law of the case.

(e) The prosecution of the State Court actions will in no wise interfere with the jurisdiction of the District Court to proceed to trial and to make an award to these appellants for the value of their leasehold interest in the real property and the value of their personal property at the time of the filing of the Amended Complaint in the condemnation action on January 12, 1944.

(f) Defendant Treasure Company having the right to remove improvements put on the land covered by its lease, it was not entitled to recover compensation for such improvements in this condemnation action, until the Supplemental or Amended Complaint was filed.

(g) The provisions of Section 265 of the Federal Judicial Code renders the granting of the injunction in this case erroneous, an abuse of discretion, and a violation of established principles of law, and therefore, said order refusing to vacate said injunction should be reversed.

ARGUMENT UNDER ABOVE POINTS.

(1) The United States District Court Has Jurisdiction to Dissolve an Injunction if the Court Is Convinced That It Was Improvidently Granted in the First Instance, Though There Has Been No Change in Circumstances Since the Injunction Was Granted.

In the case of *American Ins. Co. v. Scheufler,* 129 F. (2d) 143, a preliminary injunction was procured by certain insurance companies restraining the attorney general from interfering with the collection of a proposed increase in the insurance rates of the plaintiff companies before a judicial determination was had of the plaintiffs' rights to collect such increased rates. By the terms of the injunction the plaintiffs were permitted to collect the increased rates pending the trial on condition that such sums be paid into court. By the final judgment it was determined that all of the impounded funds should be returned to the policy holders in proportion to their respective contributions to the funds on deposit with the court and the injunction was thereupon dissolved. The court in holding that the injunction went further than merely preserving the *status quo* in that it permitted the taking of the increased rates from the policy holders and transferring them to the custody of the court, said at page 147:

> "They had originally been collected from the policyholders, not by reason of any legal rate schedule, but by virtue of injunctions which were entered permitting the collection of an increased premium rate on condition that the amount of the increase be deposited in court to await final hearing. It is worthy of note that these interlocutory injunctions went further than merely preserving the *status quo* until final hearing. They in effect permitted taking this premium

money from one party to the suit and transferring it to the custodian of the court. This conditional relief was granted in the discretion of the court. There was no right in the insurance companies to collect this increase in premium. Its collection *pendente lite* was not essential to preserve the *status quo* of the matter in controversy, but the injunctions rather disturbed that status. The suits might well have been prosecuted without the granting of the interlocutory injunctions. Having granted these injunctions, the court had a right to modify or dissolve them. The plaintiffs acquired no perpetual or vested right in the remedy, but the injunctional orders were ambulatory in character, going forward with the progress of the litigation."

So in the present case neither the UNITED STATES MARSHAL nor Union Oil Company had any legal right to take the personal property of these defendants prior to January 12, 1944, the date of the filing of the amended complaint, and hence the District Court could not compensate these appellants for the depreciation or loss of appellants' personal property occurring between September 28, 1942, and January 12, 1944.

Therefore the injunction restraining the prosecution of the State Court Actions Nos. 505-967 and 505-968 could not operate to maintain the *status quo* but rather disturbed it in that it takes from these appellants the right to prosecute the State Court actions for the recovery of the possession of their personal property thus unlawfully taken by the UNITED STATES MARSHAL and Union Oil Company, or the value of such property, the respondent herein not being obligated to respond in damages in respect to the loss and deterioration of such personal property between September 28, 1942, and January 12, 1944.

In *Westerly Waterworks v. Town of Westerly,* 77 Fed. 783, plaintiff brought an action to restrain the defendant Town from proceeding with the construction of a municipal water works after the plaintiff had expended considerable money in erecting the waterworks pursuant to a contract between plaintiff and defendant whereby the plaintiff had been granted the exclusive right to use the highways of the defendant Town for the installation of plaintiff's water mains for the purpose of supplying the inhabitants of the Town with water. The Circuit Court in pointing out that the motion to dissolve an injunction is not equivalent to a motion for a rehearing of the application for the injunction, said at page 784:

> "The first objection is to the form of these motions. Whatever may be the precise wording of the motions, they were intended to be, and should be treated as, motions to dissolve a preliminary injunction, and not motions for a rehearing, as that term is generally understood."

Furthermore, the court in holding that the order granting a temporary (or what under the California Code is designated as a preliminary) injunction is at all times subject to motion in the Federal Trial Court to be vacated or modified, said at pages 784-5:

> "Interlocutory orders granting temporary injunctions pending a hearing on the merits are at all times subject to motion to vacate or modify. These orders are not governed by the rules which apply to rehearings, where the merits of a case have been decided upon proper proofs. The granting or refusing of such injunction is addressed to the sound discretion of the court, and is not a determination of the merits of the case, and cannot operate as such except by stipulation of both parties. According to the due

course of equity procedure, no hearing can be had on the merits, and no final decree entered, until after answer, replication, and proofs taken in the regular manner. The complainant in the present case seems to have proceeded upon the theory that the hearing before Judge Carpenter on motion for a preliminary injunction was in the nature of a final hearing, and should be treated as such, but this is clearly an error. If the court, in its decision, chose to enter upon a discussion of the merits of the case, that circumstance cannot in any way operate to change the real character of the order."

The objection to the setting of the motion for hearing was denied and the matter set down for hearing on its merits.

In *Indiana Quartered Oak Co. v. Federal Trade Com.,* 58 F. (2d) 182, the petitioner sought a writ of certiorari to review an order made by the defendant Federal Trade Commission restraining petitioner from using the name "Philippine Mahogany" in connection with the sale of certain wood imported from the Philippine Islands. The writ was denied by the Circuit Court of Appeals which had original and exclusive jurisdiction to review orders of the Federal Trade Commission. Thereafter the proceedings were had before the defendant Federal Trade Commission in which it was determined that the use of the designation "Philippine Mahogany" was proper in connection with the wood in question. The petitioner thereupon moved for an order vacating the injunction in question. The court in holding that a Federal Court in equity has inherent power to modify injunctive orders upon good cause shown and where equity demands such action, said at page 184:

"This court therefore has original jurisdiction in the matter of setting aside or modifying orders of the

> Commission. With such original jurisdiction, it has the power to vacate its own order upon good cause shown and where equity demands such action. Such power is inherent in a court of equity where a modification of an injunctive order is sought."

It is significant that since the granting of the injunction on January 27, 1947, the UNITED STATES CIRCUIT COURT OF APPEALS for the Ninth Circuit rendered its opinion on March 22, 1947, in the case of *United States v. Samuel Block*, 160 F. (2d) 604. The appeal in the *Block* case was taken by the respondent herein from a decree made in the above entitled action awarding defendant Block compensation for the condemnation of his personal property and leasehold. By this decision the Circuit Court of Appeals held that the award in a condemnation action must be predicated on the value of the property at the time of the legal taking by the governmental agency. Personal property cannot be legally taken until a suit is filed to condemn personal property. This amendment was filed Jan. 12, 1944. Such holding by the Circuit Court of Appeals is now the law of the case as to the time at which the value must be fixed for the purpose of computing the award to be made for the taking of the personal property of the appellants TREASURE COMPANY and SAMARKAND OIL COMPANY, namely, not earlier than January 12, 1944.

The decision in the *Block* case would preclude this Court from allowing any compensation to these appellants on account of depreciation or loss of the said appellants' personal property between September 28, 1942, and January 12, 1944. It follows that the respondent's contention that the respondent herein is obligated to pay these appellants the reasonable value of the personal property

taken at the time of its tortious taking by the UNION OIL COMPANY on September 28, 1942, cannot be maintained. The appellants herein must have recourse to the actions in the State Court against the UNION OIL COMPANY in order to recover for the deterioration and loss of the personal property of these appellants between September 28, 1942, and January 12, 1944.

Under these circumstances the District Court should have dissolved the injunction of January 27, 1947, if it was convinced that the injunction should not have been granted in the first instance either by reason of misapprehension by the Court of the facts or the law applicable thereto regardless of whether there had been a change in the circumstances or not. As it is clear that the granting of the temporary injunction was contrary to law, the Court should have immediately vacated it upon motion.

(2) An Order Refusing to Dissolve an Injunction Is Appealable Either Under 28 U. S. C. A.-227, or Under Section 963 of the Code of Civil Procedure of the State of California.

40 U. S. C. A. 258 provides that the procedure in condemnation actions in the Federal Court shall be governed by the State law.

28 U. S. C. A., following 723(c), Rule 81-a-7 provides that the rules of civil procedure shall apply to appeals in proceedings for the condemnation of property under the power of eminent domain but are not otherwise applicable.

28 U. S. C. A. 227 provides that an appeal will lie from an order refusing to dissolve an injunction.

Section 963 of the Code of Civil Procedure of the State of California provides for an appeal from an order

refusing to dissolve an injunction. The pertinent portions of Section 963 of the Code of Civil Procedure read as follows:

> "Section 963. (Cases in which appeal may be taken from Superior Court.) An appeal may be taken from a superior court in the following cases:
>
> * * * * * * * *
>
> 2. From an order granting a new trial or denying a motion for judgment notwithstanding the verdict, or granting or dissolving an injunction, or refusing to grant or dissolve an injunction, * * *"

It follows that if the order here in question is not appealable under 28 U. S. C. A. 227 because 40 U. S. C. A. 258 provides that the State law shall govern the procedure in Federal condemnation actions, the order here in question is appealable under Section 963 of Code of Civil Procedure.

In *Western Union Tel. Co. v. Louisville & N. R. Co.,* 201 Fed. 919, the court in holding that the only question presented on the appeal from the order restraining the prosecution of the condemnation proceeding was whether or not the trial District Court had rightfully exercised its discretion in granting the injunction, said at page 923:

> "All further propositions of error relate alone to the issues tendered by the bill upon the merits of the controversy, which require hearing in conformity with the rules of equity for determination of all issues both of fact and law. The bill states, as we believe, entertainable cause for a hearing in equity, so that the appeal from the interlocutory order raises this single question: Was judicial discretion ex-

ceeded in staying the condemnation proceedings pending such hearing?

"Under the impressions of fact stated in the ruling of the trial court, founded on the preliminary affidavits, we believe the discretion was rightly exercised, and the order accordingly is affirmed."

It would appear from this that the order refusing to vacate the preliminary injunction in the present case is an appealable order.

In *Puget Sound Power & Light Co. v. Asia,* 2 F. (2d) 485, the court said at page 489:

"'An examination of the cases . . . will show that in every well-considered case, when an injunction restraining already instituted proceedings in a state court has been issued by a United States court, it was either based on a decree or judgment of the United States court which it was necessary and proper to enforce; or, if issued prior to judgment or decree, it was directed against a party who, after jurisdiction over him and the cause was fully vested, had resorted to proceedings in the state court necessarily conflicting with, if not ousting, the jurisdiction of the United States Court.'"

In any event if it be said that the order here in question is not appealable under 28 U. S. C. A. 227 because condemnation actions are governed by the state law, then the order under consideration is appealable under Section 963 of the Code of Civil Procedure of the State of California.

(3) An Order of a District Court Granting or Vacating, or Refusing to Vacate, an Injunction, May Be Reversed if the Court Abused Its Discretion in So Doing, or It Appears That There Has Been a Disregard for Established Principles of Law.

In *Nisonoff v. Irving Trust Co.*, 68 F. (2d) 32, at page 33 of the decision, it is said:

> "* * * (1) The record fairly shows that the defendant does what it is thus charged with doing. It seeks to justify its conduct in these respects by showing as to (a) and (b) that what it receives is lawfully allowed to it as expenses, and as to (c) that it acts by express authorization under Rule 30 of the District Court duly approved, and within the scope of General Order in Bankruptcy 46 promulgated by the Supreme Court (11 U. S. C. A. Section 53). As the facts are clear on the record, the plaintiff's right to an injunction *pendente lite* involves no element of discretion, but depends rather on her right to a permanent injunction. The element of time when the restraint shall become effective, if ever, is alone the distinguishing feature, and so, while the general rule is that the grant or refusal of a preliminary injunction falls within the exercise of a sound discretion by the trial court, that does not obtain where there has been a refusal or failure to follow clearly established principles of law properly applicable to facts not in dispute. *Winchester Repeating Arms Co. v. Olmsted* (C. C. A.), 203 F. 493. Compare *Union Tool Co. v. Wilson*, 259 U. S. 107, 112, 42 S. Ct. 427, 66 L. Ed. 848. Consequently the denial of the injunction *pendente lite* cannot be supported merely as a ruling within the proper bounds of the discretion of the trial court, but must be considered on the basis of legal right. * * *"

(4) The United States District Court Abused Its Discretion and Disregarded Established Principles of Law in Refusing to Dissolve Its Injunction Previously Given, Because by Such Refusal It Denied to These Appellants All Recourse for the Wrongful Taking of Said Appellants' Personal Property on September 28, 1942, Its Detention Thereafter, Its Subsequent Deterioration, and for the Value of Its Use From September 28, 1942, Until January 12, 1944, for the Following Reasons:

(a) The Machinery and Equipment Described in the State Court Actions Being Personal Property as Between the Respondent Government and These Appellants, the District Court acquired No Jurisdiction Over the Personal Property Described in Said State Court Actions Until the Filing of the Amended Complaint on January 12, 1944, by Which a New Cause of Action Was Stated by Which It Was First Sought to Condemn Said Personal Property, and Therefore, No Award Can Be Made to These Appellants in the Condemnation Action for the Use and Deterioration in Value of the Personal Property Between the Filing of the Original Complaint on September 28, 1942, and the Filing of Pleading Designated an Amended Complaint, Which Was in Fact a Supplemental Complaint, on January 12, 1944.

(1) The Taking and Retention of the Personal Property of Appellants by Union Oil Company of California Was Unauthorized and Unlawful and Even Though Said Corporation Claimed to Be Acting for Appellee, Still a Cause of Action Immediately Arose in Favor of Appellants for Such Unlawful Taking and Retention.

The undisputed facts establish that on or about September 28, 1942, appellants were the owners of certain

personal property consisting of oil equipment situated on land in the Del Rey Hills. On that day or the following, although the order of the Court only directed the taking of possession of land [Tr. pp. 14 to 19], Union Oil Company took possession of said personal property and retained it thereafter against the will of appellants. There could only be one justification for the taking and retention of such personal property and that would be a valid order so to do.

Because the taking was invalid and unlawful a cause of action immediately arose in favor of appellants and against those unlawfully taking and withholding the property.

In these cases appellants chose to sue Union Oil Company, a substantial California corporation. Once having had a cause of action for damages no one could take away such right, without appellants' consent.

In similar cases involving other personal property, taken under similar circumstances, certain actions were filed by appellants against UNION OIL COMPANY, which actions were filed November 15, 1943, before the amended condemnation action was filed on January 12, 1944.

As we have pointed out, when an injunction was sought in the United States District Court to enjoin the State Court from trying such actions, Judge McCormick, in refusing the injunction, questioned the good faith of the Government in filing the amendment. He indicated that the amendment was filed trying to get the Government and Union Oil Company out of a tight spot by reason of the unlawful taking of the property. And the Judge was well justified in his conclusion.

Bearing in mind that the purpose for which the land was taken was to establish a gas storage basin, it would take considerable imagination to say that the equipment described in the original state actions and the present actions could in good faith be said to be suitable for establishing a gas storage basin.

The question that must be decided now is whether a cause of action arose in favor of appellants when on or about September 28, 1942, Union Oil Company came into possession of and retained possession of the personal property involved in the present state actions against the will of appellants.

This personal property was owned by appellants. As the record shows, after a suit to condemn land was filed, the United States Marshal was given an order for the immediate possession of land. Union Oil Company, which claims to be the agent of Defense Plant Corporation, then took possession of the personal property. If such taking was lawful the record does not show it. In fact the undisputed record shows such taking and retention was unlawful.

Neither the United States of America, Reconstruction Finance Corporation or Defense Plant Corporation, or Union Oil Company, their agent, had a right to take or retain any part of the personal property, on September 28, 1942, or at any time before January 12, 1944, when it filed its amended complaint covering personal property.

The Second War Powers Act under which the condemnation was filed, until March 1942 had no provision

for the taking by condemnation of personal property. While elaborate proceedings are set up for the taking of immediate possession of real estate, by a deposit in Court of the estimated value of land taken, such procedure does not apply specifically to personal property.

The Second War Powers Act as amended in March 1942 provided in part as follows:

> "Upon or after the filing of the condemnation petition immediate possession may be taken."

This is the only authorization that is found in the Federal Statutes for the taking of possession of and retaining of personal property.

The only construction to be placed upon the Statute is that personal property may only be taken upon or after the filing of a condemnation suit to condemn personal property.

Undoubtedly the Government has a right to take immediate possession even though the provision as to depositing money, its value, in Court, is not specifically made to apply to personal property.

As the appellee and its agencies did not have a lawful right to take possession of appellant's personal property, Defense Plant Corporation's agent, Union Oil Company, had no right to take possession of and to hold such property.

Not having had the lawful right to either take or hold such personal property, appellants had an immediate cause of action against Union Oil Company for such unlawful taking and detention.

(2) The Filing of the Amended Complaint in the Condemnation Action Seeking to Condemn the Personal Property Did Not Constitute a Ratification of the Original Wrongful Taking by the Individual Acting as United States Marshal nor of the Wrongful Retention Thereof by the Union Oil Company.

The amended complaint in so far as the personal property is concerned stated a new cause of action.

In *Adams v. Hoskins,* 144 Cal. 19, the court in holding that an amended complaint in a partition action including additional real property stated a new cause of action, in so far as such additional property is concerned, said at page 28:

> "There is no foundation for the complaint that the decision of the trial court as to the statute of limitations was inconsistent and unfair as applied to the interests of the several parties to the suit. These appellants were parties to the original complaint and their lands were expressly included therein. The lands of the defendants whose title by adverse possession were upheld were expressly excluded from the original complaint and were brought in subsequently after the five-year statute of limitations had run in their favor."

The amended complaint having stated a new cause of action in so far as the personal property is concerned whereby the personal property was for the first time effectually sought to be condemned, such amended complaint cannot be deemed to constitute a ratification of the prior wrongful taking of the personal property, but on the other hand, constituted initiation of a new proceeding which spoke only from the time of the filing of such

amendment on January 12, 1944. (See *McKnight v. Gelzean,* 29 Cal. App. (2d) 218.)

The filing of such amended complaint is the only fact relied upon in the answers of the Union Oil Company in the state cases to establish a ratification by the Government of the original wrongful taking. The filing of such amendment, however, does not have the effect of ratifying such original wrongful taking.

(3) The Machinery and Equipment Referred to in the Exhibit Attached to the Amended Complaint [Tr. p. 84], Is Personal Property as Between the Appellee and the Appellants and Therefore Did Not Become Subject to Condemnation in the Above Entitled Action Until the Filing of the Amended Complaint on January 12, 1944.

In *People v. Church,* 57 Cal. App. (2d) Supp. 1032, the State brought an action to recover possession of a certain gas pump and automobile hoist. The State had theretofore filed an action to condemn certain land including that of which defendant Church was lessee and on which the pump and hoist were located. The plaintiff in the condemnation action had judgment in condemnation in respect to the real property and improvements. Before surrendering possession the defendant Church removed the pump which rested on a cement foundation and the hoist which consisted of a metal cylinder resting on a cement base which was sunk seven feet below the surface. The defendant had judgment from which the plaintiff appealed. In confirming the judgment the court said at pages 1048-9:

"As between private parties such as those bearing the relationship to each other of landlord and tenant, . . . their mutual intention as to whether an article is a fixture and part of the realty or is personalty is the controlling factor. As to third persons who are not parties to any such private agreement, however, the intent which controls is not a secret hidden intent but that manifested by the physical facts, giving due consideration to the status of the party by whom the articles have been installed.

See, to the same effect,

Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 216 Ind. 573, 25 N. E. (2d) 444, 447-8.

San Diego Trust and Savings Bank v. San Diego, 16 Cal. (2d) 142;

Whitlock Avenue v. City of New York, 16 N. E. (2d) 281;

Futrovsky v. United States, 66 F. (2d) 215, 216.

In *Potomac Electric Power Co. v. United States,* 85 F. (2d) 243, the court said at page 248:

"The rule applicable to so-called fixtures in buildings taken in federal condemnations is that, if they can be removed without substantial injury either to the real estate or to the fixtures, they remain personalty and need not be taken as part of the realty."

In *United Natural Gas Co. v. James Bros. Lumber Co.,* 191 Atl. 12, an action was brought by the grantee of certain reserve oil rights to determine his rights thereto. The court in holding that the equipment and appliances

used in connection with the operation of the oil well constituted trade fixtures, said at page 14:

> "The equipment and appliances used in connection with the wells are trade fixtures."

In *Moore v. Carey*, 39 A. L. R. 1247 (Texas), the court said at page 1249:

> "No part of the realty passed by that sale, except the oil and gas and the right to use the soil in discovering, developing, and bringing to the surface such oil and gas as might be found in the land in the period of the lease. If the casing of an oil well becomes a fixture,—a part of the soil,—when placed in the well, then every lessee who might put down a well on leased ground would lose title to the casing he puts into it. It would become the property of the lessor unless the contract specially provided otherwise. This ought not to be, and is not the law. Thornton's Law of Oil & Gas, vol. 2, 3d ed. Sec. 653, says: 'A lessee of land to bore for oil, who does not find any oil, has a right to remove not only the machinery used in sinking the well, but also the casings in the well, unless there be a contract to the contrary concerning their removal.'"

Moreover, it is to be noted that Paragraph 25 of the respective leases under which the moving defendants have been in possession of the real property sought to be condemned provide in part as follows:

> "Within six (6) months after such expiration or termination, Lessee shall (subject to the rights and privileges granted the Lessee and to other provisions

of this lease) remove from such premises so terminated all of its rigs, machinery and other property, and shall, so far as possible, fill all sump holes and other excavations made by Lessee.' [Affidavit of G. de Bretteville in Support of Motion to Vacate Injunction—Tr. pp. 184, 185.]

In *Consolidated Ice Co. v. Pennsylvania Railroad Co.*, 73 Atl. 937, the court said:

> "Clearly the plaintiff was not entitled to have considered, in ascertaining the value of the leasehold or to recover as an element of damage, the value of the machinery in place at the time of the institution of condemnation proceedings. By the terms of the lease, plaintiff company had the right, at the expiration of the term, to remove the machinery and fixtures placed on the premises by the lessee . . . The appropriation by the defendant determined the lease, but it did not take the fixtures and machinery placed upon the demised premises by the lessee . . . The filing of the bond by the railroad company was not, as we have seen, an appropriation of the improvements by the company imposing liability for their market value."

It necessarily follows that even though the original complaint was sufficient to give the court jurisdiction to condemn the defendants' leasehold interests under their subleases such original complaint, was not sufficient to include the equipment and supplies described in the exhibit attached to the amended complaint.

(4) This Court Acquired No Jurisdiction Over the Personal Property Described in the State Court Action Until the Filing of the Amended Complaint on January 12, 1944.

The first mention of machinery and equipment is made in the amendatory resolution of October 4, 1943 [Tr. p. 81], pursuant to which the amended complaint was filed January 12, 1944, by which it is alleged in Paragraph VIII thereof, contrary to the undisputed facts, that on September 18, 1942, said Reconstruction Finance Corporation by resolution duly adopted by its Board of Directors resolved and determined that it was necessary for war purposes that the property, real, personal and mixed, herein described, be acquired by condemnation [Tr. p. 41] (when as a matter of fact said resolution only referred to land), and by Paragraph XIII it is alleged [Tr. p. 43]:

> "That the property which the plaintiff by this action intends and seeks to take, acquire, and condemn, hold and own, includes the following:
>
> "All pipe, machinery, appliances, equipment, tanks, structures, tools, supplies, and all other property, whether real or personal, which were located in or upon any of the said tracts of land hereinabove described, on the 28th day of September, 1942, and which on said day were used, or were useful, in the operation of any oil and/or gas wells, upon any of said parcels of land, or in the treating, storing, or disposing of the products of any of such wells."

It is thus to be noted that the amended complaint makes no reference to the amendatory resolution of October 4, 1943, but Paragraph IV of the petition for injunction [Tr. p. 68] alleges that by the resolution of October 4,

1943, the Board of Directors of RECONSTRUCTION FINANCE CORPORATION approved, ratified and confirmed the taking, condemnation and possession of such machinery and equipment. The resolution, however, a copy of which was attached to the petition for an injunction and marked "Exhibit B" [Tr. p. 81], does not by its terms allege any ratification of any such taking, condemnation or possession by the RECONSTRUCTION FINANCE CORPORATION but simply recites that the DEFENSE PLANT CORPORATION has taken possession of such machinery and equipment and then proceeds to resolve that it is necessary for DEFENSE PLANT CORPORATION to acquire such machinery and equipment by condemnation, and further resolves that the secretary of RECONSTRUCTION FINANCE CORPORATION be authorized to request the Attorney General to take such action as may be necessary for the acquisition of such machinery and equipment by condemnation.

It is clear that the authority for the condemnation of such machinery and equipment is necessarily predicated on the amendatory resolution of October 4, 1943, pursuant to which the amended complaint was filed seeking the condemnation of such machinery and equipment or no such resolution would have been adopted or amended complaint filed. In as much as the right to condemn the machinery and equipment is based on the adoption of the resolution of October 4, 1943, after the filing of the original complaint, the adoption of such resolution should have been alleged by way of supplemental complaint rather than by an amended complaint. Moreover, it is to be observed that no declaration of taking nor decree of taking has been filed in respect to the machinery and

equipment either before or after the filing of the amended complaint on January 12, 1944.

In *United States v. Bauman,* 56 Fed. Supp. 109, the court in denying the motion for leave to amend, said at page 111:

> "Furthermore, events occurring subsequent to the filing of an original complaint, must be set up by supplemental complaint rather than mere amendment."
>
> . . . . . .
>
> "A court order was granted allowing it to enter under the protection of the court in the exact terms of the complaint. The complaint which instituted the proceedings fixed the rights of the parties."

It is clear from this that an amended or supplemental complaint by which additional or different property is sought to be condemned will not be effective, if at all, until the filing of such amended or supplemental complaint followed by an order for immediate possession and the entry of a declaration of taking and a decree upon declaration of taking in conformity with the terms of such amended or supplemental complaint.

It must be clear from the foregoing that if the machinery and equipment sought to be recovered in the State Court actions are deemed to be personal property the court acquired no jurisdiction over such machinery and equipment until the filing of the amended complaint on January 12, 1944, if in fact such jurisdiction was acquired at that time.

On the other hand, if such equipment be deemed to be real property by reason of the method by which some of it may be affixed to the land, it must likewise be concluded

that the court did not acquire jurisdiction in respect thereto until January 12, 1944. This is so for the reason that the resolution of September 18, 1942, the original complaint, the order for immediate possession dated September 28, 1942, the declaration of taking and the decree upon declaration of taking entered October 26, 1942, uniformly related only to land as distinguished from real property.

Sections 658, 659 and 660 of the *Civil Code* of the State of California provide as follows:

"658. (*Definition of real property: Severance by agreement.*) Real or immovable property consists of:

1. Land;

2. That which is affixed to land;

3. That which is incidental or appurtenant to land;

4. That which is immovable by law; except that for the purposes of sale, emblements, industrial growing crops and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale, shall be treated as goods and be governed by the provisions of the title of this code regulating the sales of goods."

"659. *Land.* Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance."

"660. (*Definition of fixtures: Severance by agreement.*) A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement,

> plaster, nails, bolts, or screws; except that for the purpose of sale, emblements, industrial growing crops and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale, shall be treated as goods and be governed by the provisions of the title of this code regulating the sales of goods."

Assuming that by reason of the manner in which such machinery and equipment was affixed to the land within the meaning of Section 660 of the Civil Code, above quoted, the machinery and equipment, or some part thereof, is deemed to be a part of the real property, it would still be a different estate or interest in the real property than the appellants have in the land itself, which is defined by Section 659 of the Civil Code, above quoted, and would not be embraced within the meaning of the word "land" as used in the documents above referred to.

The court in *United States v. Bauman, supra,* in pointing out that only such an estate can be acquired by condemnation as is described in the complaint, said at page 113:

> "It would be a vain thing to require condemnation proceedings to be initiated in a court if, thereafter, a declaration of taking could be filed which related to an entirely different piece of land or an entirely different estate in the same parcel and that title to the parcel or estate passes irrespective of a variance between that and the description in the complaint. Title, therefore, did not pass to the revised estates described in the purported declaration of taking here."

It is clear, therefore, that whether the machinery and equipment here in question be deemed to be real or per-

sonal property this court acquired no jurisdiction over such machinery and equipment until January 12, 1944, for the interest in such machinery and equipment would necessarily be something different and apart from the appellants' interest in the land itself, which was the sole subject of condemnation until the adoption of the amendatory resolution of October 4, 1943.

In *re Pearl River-Nanuet Highway No. 9006,* 291 N. Y. S. 846, the court said at pages 847 and 848:

> "There is no power in the court, as a consequence of statutory authority or case law, to amend the petition or the judgment in the condemnation proceedings by way of including therein property not originally described in said petition pursuant to authority from the Board of Supervisors. *Matter of Willcox* (Fourth Ave. Subway), 213 N. Y. 218, 223, 225, 107 N. E. 499."

Even assuming that the additional land or property could be subjected to condemnation by the filing of an amended complaint in the same action surely upon authority of the last cited case the court would not acquire jurisdiction over such additional land or property until the filing of such amended complaint.

Subdivision (c) of Section 15 of Federal Rules of Procedure following 28 U. S. C. A. 723(c) provides as follows:

> "(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

The amended complaint cannot relate back to the date of the filing of the original complaint in so far as the amended complaint seeks the acquisition by condemnation of the machinery and equipment which is described in the amended complaint, but is in no wise referred to in the original complaint.

See also,

Sink v. Mutual Life Ins. Co. of New York, 56 Fed. Supp. 306, 307.

The pleading which, in fact, is a supplemental complaint, that is, one which depends on matters which have transpired subsequent to the filing of the original complaint, is only effective from the date of its filing and does not relate back to the time of the filing of the original complaint. (See *Valensin v. Valensin,* 73 Cal. 106 at 109.)

Likewise, if an amended complaint relates to a new subject matter and constitutes a new cause of action it is only effective as of the time of its filing and does not relate back to the time of the filing of the original complaint. (*Merchants Nat. Bank v. Bentel,* 166 Cal. 473, and *Rideaux v. Torgrimson*, 39 Cal. App. (2d) 273.)

Actions in condemnation are *in invitum* and all of the statutory provisions in reference thereto must be strictly complied with. (*City of Los Angeles v. Glassell,* 203 Cal. 44.)

See also,

Witham Const. Co. v. Remer, 105 F. (2d) 371, 375, 376 (10th Circuit).

It is clear, therefore, that whether the so-called amended complaint be treated as an amended complaint or as a supplemental complaint and regardless of whether the machinery and equipment be deemed to be real or personal property such pleading introduces a different and an additional claim, that is, a claim for the condemnation of machinery and equipment not referred to in the original complaint and, therefore, such pleading did not relate back to the filing of the original complaint and hence the court acquired no jurisdiction over such machinery and equipment until January 12, 1944, upon the filing of the amended complaint. Under such circumstances the taking possession of personal property cannot be justified and resulted in an immediate cause of action in favor of appellant.

(5) The Court Having Acquired Jurisdiction of the Machinery and Equipment on January 12, 1944, the Award Which May Be Made in the Present Action Is Limited to the Value of the Machinery and Equipment on January 12, 1944.

The law is well established that the award must be predicated on the value of the property upon the date of the effective taking by the corporation or agency authorized by law to exercise the power of eminent domain.

In *United States v. Miller,* 87 L. Ed. 336, the United States Supreme Court on a writ of certiorari to the Circuit Court of the Ninth Circuit, said at page 343:

> "Respondents correctly say that value is to be ascertained as of the date of taking."

This, of course, means pursuant to a lawful taking for it is expressly held in *Loomis v. City of Augusta,* 99 P. (2d) 988 at 990, that no damages can be recovered in an action in condemnation except upon a lawful taking.

In *Nichols v. City of Cleveland,* 135 N. E. 291, it was held that:

> "Where property has been appropriated in an invalid condemnation proceeding, damages in a subsequent valid proceeding are to be assessed as of the date of the hearing in the valid proceeding."

The taking by an officer who is unauthorized so to do does not render the government liable in an action in eminent domain for such wrongful taking.

In *United States v. North American Transportation & Trading Co.,* 64 L. Ed. 935, the court said at page 937:

> "In order that the government shall be liable, it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power."
>
> . . . . . .
>
> "What he had done before that date having been without authority, and hence tortious, created no liability on the part of the government."

But when Union Oil Company took and retained possession of such personal property on or about September 28, 1942, a cause of action arose immediately in favor of appellants, and it is those causes of action sought to be enforced in the State Court.

(6) The Only Recovery That Can Be Had by the Appellants Treasure Company and Samarkand Oil Company in the Condemnation Action in Respect to the Taking of Personal Property Is the Value of the Personal Property at the Time of the Filing of the Amended Complaint on January 12, 1944, Whereby It Was Sought for the First Time to Condemn the Personal Property.

In order for the owner of property to be entitled to the recovery of compensation in a condemnation action the taking must be lawful. The provisions of the law in respect to condemnation proceedings must be strictly complied with.

Section 2 of the U. S. C. A. 632 (Title II, 2nd War Powers Act) provides as follows:

> "Upon and after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act (this section and section 171 of Title 50), notwithstanding any other law."

In *City of Los Angeles v. Glassell,* 203 Cal. 44, the court said at page 46:

> "It requires no citation of authority upon the proposition that eminent domain proceedings are *in invitum,* and the same may be said of proceedings to assess and collect any outlay necessary to the establishment of parks and playgrounds under the act here involved: '. . . and the statutory authority must be strictly pursued, and every condition or other prerequisite to the exercise of jurisdiction be observed, especially every requisite of the statute having the semblance of benefit to the landowner . . .' (20 Corpus Juris, pp. 882, 883.)"

Section 1249 of the *California Code of Civil Procedure* provides in part as follows:

> "For the purpose of assessing compensation and damages the right thereof shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken, . . ."

It may be observed that in *United States v. North American Transportation and Trading Co., supra,* the commanding officer of the Army had taken possession of certain real property without authorization from the Secretary of War so to do. Thereafter the Secretary of War authorized the taking and the Government proceeded to erect improvements on the land. Compensation was allowed the owner in an action brought in the court of claims not upon the theory that the wrongful taking had been subsequently ratified but that the taking was a lawful one from and after the authorization by the Secretary of War.

The original taking being tortious there could be no ratification of the original wrongful taking which would enable the owner to recover in the condemnation action the value of the property at the time of the wrongful taking on September 28, 1942. This is so for the reason that the proceedings had in respect to the personal property prior to January 12, 1944, were void as such personal property and was not included in the original complaint in condemnation, the order for immediate possession, or in the decree of taking. If the requirements of the statute are not complied with the proceedings are void. (*Barker v. Kansas City,* 70 P. (2d) 5.)

(b) Although the So-called Amended Complaint in the Condemnation Action Was Filed January 12, 1944, Whereby It Was Sought to Condemn the Personal Property Described in the State Court Actions, the Commencement of the State Court Actions on September 27, 1945, and the Maintenance Thereof Do Not Constitute a Violation of the Rule That the Court Which First Acquires Jurisdiction in an Action in Rem Is Entitled to Retain Exclusive Jurisdiction of Such Action, Because the State Court Actions in so far as They Seek to Recover the Value of the Loss of the Use and of the Depreciation in Value of Such Personal Property Are Actions in Personam Rather Than Actions in Rem, and the District Court Is Without Jurisdiction to Grant Relief for the Unlawful Taking and Detention of Such Personal Property.

(1) The Right of the Federal Court to Retain Exclusive Jurisdiction First Acquired to the Exclusion of the State Court Is Confined to Cases in Which the Actions in Both the State and Federal Courts Are Actions in Rem.

In *Toucey v. New York Life Ins. Co.,* 86 L. Ed. 100, the court said at pages 105 and 106:

> "The rank and authority of the federal and state courts are equal but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist in actions *in rem* and does not exist in actions *in personam,* involving a question of personal liability only, the rule applies in the former but does not apply in the latter."

In *Princess Lida v. Thompson,* 83 L. Ed. 285, the court said at page 291:

> "Certain it is, therefore, that if both courts were to proceed they would be required to cover the same ground. This of itself is not conclusive of the question of the District Court's jurisdiction, for it is settled that where the judgment sought is strictly *in personam,* both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as *res judicata* in the other."

If the provisions of the condemnation statute are not complied with the court has no power to proceed. (*Clay County Court v. Baker,* 241 S. W. 447.)

In *Housing Authority v. Forbes,* 51 Cal. App. (2d) 1, the court said at page 4:

> "Under the act, however, certain steps must be taken before private property can be taken by eminent domain."

It is obvious that the only recovery that can be had in the condemnation action in respect to the personal property is its value at the time of the filing of the amended complaint on January 12, 1944, leaving the owners without any compensation for depreciation of the property while in the possession of the Union Oil Company between the date of taking on September 28, 1942, and the filing of the amended complaint in the condemnation action on January 12, 1944.

The appellants do not by the State action seek to recover damages for the taking of personal property as of January 12, 1944, when the respondent could first legally

took possession of the personal property, but seek damages for the unlawful taking and retention of the personal property on and after September 28, 1942, and appellants having a valid cause of action for such taking and detention, the order enjoining the prosecution of such actions is erroneous and refusal to set it aside is an abuse of discretion.

Such rule is not applicable to Actions Nos. 505-967 and 505-968 in so far as such elements of damage suffered by the defendants in the condemnation action as cannot be recovered in the condemnation action are concerned, namely, damages caused by the wrongful taking and wrongful withholding thereof by the Union Oil Company from September 28, 1942, to January 12, 1944.

(c) The Conclusions of the Court and Its Decisions on the Motion for Injunction Rendered Herein by the Honorable Paul J. McCormick of the United States District Court on June 12, 1945, and the Findings of Fact, Conclusions of Law and Judgment Rendered by Judge William J. Palmer on October 24, 1945, in State Court Actions 489318 and 489319, Are Res Adjudicata in This Action, insofar as They Determine That the Personal Property of Appellants Taken on September 28, 1942, Was Wrongfully Taken and That Such Wrongful Taking Has Never Been Ratified by the Respondent Government or Any Agency Thereof.

As appears from the affidavit of G. de Bretteville served and filed herein all of the oil well drilling tools and equipment described and sought to be recovered by the respective State Court Actions Nos. 505-967 and 505-968, the prosecution of which actions was enjoined by the order now sought to be vacated, consists of movable property. It further appears from such affidavit and from

the complaints in such state court actions that certain tubing and sucker rods in the well are sought to be recovered. It is not sought to recover any casing in the well. The distinction between casing and tubing lies in the fact that the casing consists of a circular metal casement which serves to hold back the adjacent earth and thereby maintains the hole in which the removable metal tubing is placed and upon the end of the sucker rods is attached the pump which forces the oil to the surface. While it might be conceded that the maintenance of the casing in place is necessary to the maintenance of the well as an operating unit and, therefore, should be deemed to be an integral part of the leasehold which would be compensated for by the compensation allowed for the taking of the leasehold, such is not the case in respect to the tubing, sucker rods and other tools and equipment described in the complaints in the respective state court actions above referred to.

In *Brazos River Con. etc. Dist. v. Adkisson,* 173 S. W. (2d) 294, plaintiff brought an action to enjoin the defendant District from flooding plaintiff's oil wells. The defendant District filed a cross-complaint seeking to condemn an easement over the premises covered by plaintiff's leasehold. By the answer to the cross-complaint plaintiff alleged that he was the owner of the leasehold which had been flooded by the negligent operation of a reservoir and ruining plaintiff's twelve producing wells, casing and pumping units. The description of the equipment in question was set forth in the opinion as follows:

> "That the flow tanks were connected with the flow lines. That the tanks were of steel, of 100 to 250 barrel capacity, some welded, some put together with bolts, and resting on heavy timber foundations. That on the lease in an iron house there was a central

power and an 18 foot band wheel power on a concrete foundation, with which appellee pumped eight of the wells. That this power was connected by pull rod lines, with pump jacks on the wells; that the pump jack sat over the well and lifted the sucker rods in the tubing and pumped the oil. That the sucker rods ran down through the tubing and connected with working slides. That the pump jacks were on timber foundations about 8 x 10 in size. The testimony gives in detail the operations and mechanics employed in producing oil wells."

It was contended by the District that if the equipment was deemed to be a trade fixture the taking of such fixture could not be estimated as a separate element of damage. The court in holding that if the fixtures were of such character that if put in by the owner they would constitute a part of the real property and must be paid for as a part of the real estate, said at page 299:

> "The law applicable in condemnation proceedings, where such fixtures are involved is stated in 10 R. C. L. p. 143, par. 125, as follows: 'Where fixtures are of such a character that if put in by the owner, they would constitute a part of the real estate, *they must be paid for as real estate by the party condemning the land.*' "

But in holding that if such fixtures are not attached to the soil and the right to remove the same is reserved by the lessee by whom the fixtures are installed, such fixtures would not partake of the nature of the freehold and would not pass to the landlord but would remain the property of the lessee upon the termination of the lease, said at page 298:

> "As to the nature of the casing and pumping equipment, the same text, based on an abundance of au-

thorities, says: 'It is a well-settled rule that casing in wells, derricks, engines, and other machinery and appliances placed upon the land by the lessee for testing, developing and operating the land for oil and gas purposes are trade fixtures. They may, therefore, be removed at any time during the existence of the lease, or within a reasonable time after its termination. If they are not so removed, they become the property of the landowner.' (*Summers on Oil & Gas*, Perm. Ed., Vol. 3, p. 214, Par. 526.

"The last sentence of that quotation is significant in that if such fixtures do not by attachment to the soil become a part of or partake of the nature of the freehold, then they would not become the property of the landowner."

The court in pointing out that the existence of the well as a unit was dependent upon the maintenance of the casing in the well, said at page 299:

"There is logic in appellee's reply to a hypothetical question, wherein he says: 'We can answer this by observing that (the primary term having expired) if the casing etc., did not go with a sale, but was pulled and retained by the Seller, there would be no production and no lease—and, therefore, no sale!' "

As we have pointed out, there is no attempt in the pending state court actions to recover the casing or compensation for its taking but the items which are thus sought to be recovered, or their value, consist of sucker rods, tubing, tanks and other equipment readily removable without injury to the equipment, or the leasehold, or the real property.

The same observations as to the nature of the equipment and tools sought to be recovered in the pending state

court actions are equally applicable to the items sought to be recovered in the state court actions entitled: Treasure Company, plaintiff, v. Union Oil Company, defendant, and Reconstruction Finance Corporation, a Federal Corporation, complainant in intervention, No. 489-318, and Samarkand Oil Company, plaintiff, v. Union Oil Company, defendant, and Reconstruction Finance Corporation, a Federal Corporation, complainant in intervention, No. 489-319, of the Superior Court of the State of California, in and for the County of Los Angeles.

An application by respondent for an injunction to restrain the prosecution of the last mentioned actions was denied by the Honorable Paul J. McCormick of the District Court, by an opinion rendered and filed therein on June 12, 1945. [Tr. pp. 52-63.]

As indicated, the Reconstructon Finance Corporation was substituted for Defense Plant Corporation, as intervenor in both of the last mentioned state court actions which terminated in judgments for the plaintiff in each of said cases and which judgments were entered December 6, 1945. These judgments became final and were satisfied by payment.

In the conclusions of the court and decision on motion for injunction, above referred to, the Honorable Paul J. McCormick not only held that the Superior Court of the State of California, in and for the County of Los Angeles, had exclusive jurisdiction of the causes of action set forth in the complaints in said actions Nos. 489-318 and 489-319 because such actions were commenced November 15, 1943, which was prior to the filing of the first authorized amended complaint on January 12, 1944, by which it was sought to condemn any personal property, but in hold-

ing that there was no ratification of the taking of the personal property on September 28, 1942, because the state court had already acquired jurisdiction on November 15, 1943, and before the filing of the amended complaint on January 12, 1944, said at transcript page 61:

> 'There can be no serious claim of ratification by plaintiff of the seizure of the personalty because before any adequate manifestation by plaintiff of an intention to acquire such property was evident, the State court had already acquired jurisdiction of the *res*. The factual situation here is dissimilar to that before the court in *Yearsley v. Ross Construction Co.*, 309 U. S. 18. Moreover, the *Yearsley* decision does not enunciate the principle that ratification of a taking without condemnation proceedings *ipso facto* confers jurisdiction on the United States court.
>
> "The sole method chosen to acquire the necessary war facility to which the action in this court relates was by condemnation proceedings of the judicial type brought as Title II of the Second War Powers Act specifies in accordance with the Act of August 1, 1888, Title 40 Sections 257, 258, U. S. C. A. One of the jurisdictional essentials of a proceeding in condemnation of the judicial type is that the property sought to be taken shall be described in the petition (complaint). See Section 1244, California Code of Civil Procedure.
>
> "It is clearly established by the record before us that no specification whatever of any personalty was made in any of the proceedings until the month of October, 1943, when for the first time an authorization to amend the pleadings so as to include personal property was given, and it was not until the following January that the amended complaint directed to the acquisition of the personal property in issue was filed.

"Thus we find that the earliest effectual and authorized acquiring of the personal property by the Government was subsequent to the acquiring of jurisdiction over the same *res* by the State court in the recovery actions pending therein. As no other type of authority than judicial has been invoked or applied by plaintiff in the acquisition under consideration, we consider argument and authorities as to the lodgment in the United States of other processes in eminent domain as academic and irrelevant to the motion before the court."

Furthermore, Judge William J. Palmer in his notice of decision rendered in connection with the State Court Actions No. 489-318 and 489-319 in holding that the taking on September 28, 1942, was not by any agent of the Government and that no agency of the Government was authorized to ratify the taking of such personal property on September 28, 1942, and that such taking never has been ratified by the United States Government, said [Tr. p. 163]:

"This court has not found that the United States government, or any agency of it, seized the property involved in this case on or about September 28, 1942. The court does find that an individual who held the office of United States Marshal, without any authorization from any source, without process of court related to the property in question, without direction from any agency of the government, falsely assumed dominion over the property and falsely assumed authority to deliver it into the custody of the defendant, which, equally without right or authority, thereupon asserted and took dominion over the property and thereafter held possession thereof against the demands of plaintiffs for its return.

"This court has not held of its own opinion that any agency of the government ever came into lawful

possession of the property in question, but the court has presumed, for the purposes of this trial, that in permitting the filing of a late amendment to a condemnation action pertaining to real estate, by which amendment the action was made to embrace the personal property involved in this case, the United States District Court acted properly and in accordance with law. Involving that presumption leads to the conclusion that the property was condemned as of the date of the filing of the amendment and that thereupon the United States Government, through the Defense Plant Corporation, in exercise of the right of eminent domain came into lawful possession of the property.

"It would be inaccurate to leave the impression that this judge is of the personal opinion that the commencement of condemnation proceedings against the personal property involved in this case, by way of such amendment filed in January 1944, when the actions in this Superior Court were threatened and were about to be commenced, was in good faith or was founded on any need by the Government for the property or on any intention to put it to the *public* use. This court merely applies the presumption of good faith and regularity to the proceedings of the federal agencies involved.

"This court has not found that the action of the person who first asserted unlawful dominion over the property in September of 1942 and assumed authority to deliver it over to the defendant was thereafter ratified by any agency of the United States Government. To the contrary, this court is of the opinion that no agency of the United States Government had authority to ratify such an act and the court holds that no such agency ever did ratify it. The court finds also that the unlawful action of the defendant in detaining the property from the plaintiffs never had

been ratified by any agency of the United States Government, and the court is of the opinion that no such agency has had authority to ratify such conduct."

The opinions thus expressed by Judge Palmer are reflected in Findings Nos. VII [Tr. p. 138] and XII [Tr. p. 141] of the formal findings of fact made and entered in said actions which findings of fact were signed December 5, 1945, and which findings read as follows:

"VII. On the said 28th day of September, 1942, at and on said Block 33 of Tract 9809 in said County of Los Angeles, State of California, without the plaintiff's consent and against its will, a Deputy United States Marshal, without any authorization from any source, without process of court related to said personal property, and without direction from any agency of the United States Government falsely, and wrongfully and wilfully assumed dominion over the said personal property, and wrongfully and wilfully took possession thereof and wrongfully delivered said personal property to the defendant, Union Oil Company of California, a corporation, which said defendant on said date and at said place without right or authority wrongfully and wilfully took possession of said personal property and thereafter continuously and until January 12, 1944, wrongfully and wilfully held possession thereof and detained the same and wrongfully prevented the plaintiff Samarkand Oil Company, a corporation, from taking possession thereof."

"XII. With respect to the second separate and distinct defense of said answer, the court finds that it is not true that on or about September 29, 1942, or at any time, the United States of America, for the use of Reconstruction Finance Corporation, a federal corporation, acting in behalf of Defense Plant Corporation, a federal corporation, or otherwise, appropriated or took possession of the personal property here-

inabove described or any part thereof under claim of eminent domain for use in connection with the establishment of a reservoir for the injection, storage, conservation or withdrawal of natural gas or incidental purposes or for use in the operation of oil or gas wells or in the treating, storing or disposing of the products thereof, or that it thereupon delivered said personal property or any part thereof to the defendant Union Oil Company of California, a corporation, for such uses or purposes or any of them on behalf of the Defense Plant Corporation, a federal corporation. It is not true that the said United States of America ever took possession of said personal property or any part thereof or enjoyed any lawful right to the possession or any part thereof until January 12, 1944."

The conclusion of the court and decision on motion for injunction rendered by Judge McCormick and the findings of fact and conclusions of law and judgment rendered by Judge Palmer, above referred to, were pleaded as *res adjudicata* by the third and fourth defenses, respectively, in the answers [Tr. pp. 131-134, incl.] of Treasure Company and Samarkand Oil Company to respondent's petition for the injunction, which said defendants now seek to have vacated.

Section 1908 of the Code of Civil Procedure of the State of California provides as follows:

"The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:

1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or

the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person.

2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding."

An adjudication of a matter of fact is binding in subsequent proceedings between the same parties, as well as the adjudication of their rights. This is pointed out in *Johnson v. Fontana County Fire Pro. District,* 15 Cal. (2d) 380. In that case plaintiff sought a writ of mandamus to compel the defendant Fire Protection District to pay a judgment recovered by plaintiff in a prior action in which it was found as a matter of fact that the driver of a certain automobile was the agent of the defendant. In the mandamus proceedings the defendant District alleged that the driver of the automobile was not the agent of the District. The court in holding that the rule of *res adjudicata* applies to both questions of law and fact, said at page 389:

"Whether or not the previous judgment, with its implied finding of agency, was controlling here must depend upon general rules of law applicable to that question.

" 'A former adjudication between the same parties may be either a final determination of the rights of

> the parties or may be an adjudication of certain questions of fact which have been put in issue and decided. (*People v. Bailey,* 30 Cal. App. 581, 158 Pac. 1036.) A judgment operates as an estoppel to prevent the parties thereto or their privies from contending to the contrary as to a matter of fact which was found against them in arriving at the judgment."

Not only is the respondent herein bound by the conclusions of law of Judge McCormick and the judgment rendered by Judge Palmer but is also bound by their findings of fact.

In *Todhunter v. Smith,* 219 Cal. 692, the court said at page 695:

> "A former judgment operates as a bar against a second action upon the same cause, but in a later decision upon a different claim or cause of action, it operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action. (See authorities cited *supra,* this paragraph.)"

Therefore, even though the present pending state court Actions Nos. 505-967 and 505-968 involve different causes of action than the prior State Courts Actions Nos. 489-318 and 489-319 in that different drilling tools and equipment are sought to be recovered than in the first mentioned actions, nevertheless the findings in connection with the Actions Nos. 489-318 and 489-319 in respect to the taking of personal property on September 28, 1942, hav-

ing been done without authority from any governmental agency are binding upon the respondent in its application for an injunction restraining the prosecution of Superior Court Actions Nos. 505-967 and 505-968.

(d) The Determination by the Circuit Court of Appeals in This Condemnation Proceeding, in United States v. Samuel Block, 160 F. (2d) 604, That the Award Made for the Taking of Personal Property in Connection With Condemnation Proceedings Must Be Predicated Upon the Value of the Property When It Is First Lawfully Taken Pursuant to Such Proceedings, Is the Law of the Case.

On March 22, 1947, the United States Circuit Court of Appeals for the Ninth Circuit rendered an opinion upon an appeal taken by the plaintiff herein from an award made by the District Court to Sam Block (62 Fed. Supp. 1017), one of the other defendants in this action, for the taking of personal property at the same time and under the same circumstances as those under which the personal property of Treasure Company and Samarkand Oil Company was taken.

In the *Block* case entitled *United States v. Block* and reported in 160 F. (2d) 604, the respondent herein contended on appeal the District Court erred in admitting evidence of the value of the personal property on October 4, 1943, because the respondent contended that such personal property was taken on September 28, 1942. This court in holding that the respondent was not prejudiced by the testimony of the value of the property as of October 4, 1943, even though the personal property was taken on Septem-

ber 28, 1942, because there was evidence to the effect that the value of the personal property was the same on both dates, said at page 607:

> "Appellant says that the machinery and equipment were taken on September 28, 1942, and that testimony as to their value in October, 1943, was therefore inadmissible. There was and is some uncertainty as to when the machinery and equipment were taken. As stated above, the complaint was filed and an order granting appellant immediate possession of the land was entered on September 28, 1942, and a declaration of taking was filed on October 26, 1942, but the machinery and equipment were not mentioned in the complaint, the order or the declaration. The machinery and equipment were first mentioned in the amendatory resolution of October 4, 1943. The amendatory resolution stated that Defense Plant Corporation had taken possession of the machinery and equipment, but did not state when such possession was taken. It may have been taken on October 4, 1943.
>
> "Even assuming that the machinery and equipment were taken on September 28, 1942, it does not appear that appellant was prejudiced by the fact that Rubin's and Rush's valuations were made as of October, 1943. Rush and Graydon Oliver, a witness for appellant, testified that the market value of the machinery and equipment in October, 1943, was substantially the same as on September 28, 1942. That testimony was not contradicted."

It is obvious that the Circuit Court of Appeals determined that the award must be predicated upon the value of

the property upon the date that it was legally taken by a Governmental agency.

In *Security First National Bank v. Marxen,* 19 Cal. (2d) 100, the court said at page 103:

> "The law of the case, as established by the judgment of reversal, is that the defendant expressly, by written agreement, and by joining in a subsequent lease, both of which were found by the court to have been duly executed, had subordinated its leasehold rights to the right and title of the plaintiff. The issues presented questions of law only. Those issues, decided adversely to the defendant on the former appeal, also require an affirmance of the judgment on this appeal."

It is well established that an action in condemnation is an action *in rem.* In *Harrington v. Superior Court,* 194 Cal. 185, the court said at page 189:

> "Condemnation proceedings have been described as proceedings *in rem,* and jurisdiction, therefore, does not depend on the disclosed identity of the parties defendant, but on the subject matter and an opportunity to be heard in the exercise of due process on the most effective notice possible."

The present action being one *in rem* the decision by the Circuit Court of Appeals in *United States v. Block, supra,* above referred to, is binding on all parties interested in the matter whether they were parties to the former appeal or not.

See also,

De Gear v. McLellan, 56 Cal. App. (2d) 382, 385.

It is apparent that the holding that the decision in the former appeal was binding on the plaintiff in the second action although she was not a party to the prior appeal is based on the fact that the decision in such prior appeal was rendered in an action *in rem* and, therefore, binding on all parties interested in the matter.

Estate of Carothers, 168 Cal. 691, 693-4-5:

The present condemnation proceeding being one *in rem* the decision of the Circuit Court of Appeals rendered in *United States v. Block, supra,* above referred to, is the law of the case in respect to the proposition of law that any award made in this case must be predicated on the value of the personal property at the time that it was first legally taken by an agency of the government. We have seen that the findings of Judges McCormick and Palmer to the effect that there was no legal taking of the personal property prior to January 12, 1944, are now final and *res adjudicata* and that plaintiff herein is estopped from questioning the correctness of such findings. It follows that the only award which this court can make or which the Circuit Court of Appeals can properly uphold for the taking of the personal property is one predicated on the value of such personal property on January 12, 1944.

(e) **The Prosecution of the State Court Actions Will in No Wise Interfere With the Jurisdiction of the District Court to Proceed to Trial and to Make an Award to These Appellants for the Value of Their Leasehold Interest in the Real Property and the Value of Their Personal Property at the Time of the Filing of the Amended Complaint in the Condemnation Action on January 12, 1944.**

(1) On March 10, 1945, the Respondent in the Condemnation Action Filed a Petition for an Injunction to Restrain the Defendant Treasure Company From Prosecuting Action No. 489-318 and to Restrain Samarkand Oil Company From Prosecuting Action No. 489-319 Which Cases Were Then Pending in the Superior Court of the State of California in and for the County of Los Angeles. By Said Actions the Respective Plaintiffs Therein Sought to Recover Possession of Certain Personal Property Consisting of Oil Drilling Equipment or the Value Thereof If Possession Could Not Be Had. The Personal Property Sought to Be Recovered in the Last Mentioned Actions Were Personal Property Other Than That Described and Involved in Actions Nos. 505-967 and 505-968 But Such Personal Property Was Wrongfully Taken by the Individual Acting as United States Marshal and Wrongfully Retained by the Union Oil Company Under the Same Circumstances and Under the Same Untenable Claim of Authority Which Obtains in Respect to Actions Nos. 505-967 and 505-968.

The Honorable Paul J. McCormick, of the United States District Court, denied the application to restrain the prosecution of Actions Nos. 489-318 and 489-319 on the grounds that the state court had acquired exclusive jurisdiction of the *res* by the serving of processes in

such actions prior to the filing of the amendment to the complaint in the condemnation action on January 12, 1944, and on the further ground that in as much as it was apparent that the only relief which would be granted in the state actions would be by way of a money judgment, the prosecution of such actions would not impair nor defeat the jurisdiction of the District Court in the condemnation action. In this connection Judge McCormick said [Tr. p. 63]:

> "We conclude with the observation that the injunction to restrain proceedings in either of the state court actions is unnecessary under the record before us. In the local suits no relief to the oil companies other than money judgments appears to be now possible. Such an outcome in the state court would neither impair nor defeat the jurisdiction of this court in the condemnation proceeding."

As indicated in the answers of the Union Oil Company filed in Actions Nos. 505-967 and 505-968, Actions Nos. 489-318 and 489-319 did proceed to a money judgment, which judgments have been paid and satisfied. It is likewise probable that each of the state actions, the prosecution of which is now sought to restrain, will terminate in a money judgment rather than a judgment for the possession of the property described in the complaints in said actions. In fact, no judgment excepting a money judgment can be rendered in Actions Nos. 505-967 and 505-968.

Prior to the denial of such injunction by Judge McCormick the defendant Union Oil Company and the intervenor, Defense Plant Corporation, in Actions Nos. 489-318 and 489-319 sought to abate such actions on the grounds that the above entitled condemnation action was

then pending and involved the same issues as did such state cases and that the judgment in the condemnation action would be a bar to any judgment in each of said state cases.

This motion for abatement was denied by Judge William J. Palmer in the Superior Court of the County of Los Angeles [Tr. p. 155]. The holding of Judge Palmer was predicated primarily upon the principle that if the District Court found that the original taking was unlawful and did not become lawful until the filing of the amended complaint, the Treasure Company and the Samarkand Oil Company would be unable to recover in the condemnation action any compensation or reimbursement for the wrongful detention and depreciation of the personal property from September 28, 1942, to January 12, 1944.

Judge Palmer in a most able manner in a written opinion pointed out that regardless of what conclusion might be reached in the state or federal courts in regard to the question of whether the original taking was lawful or unlawful, any judgments rendered in the state court actions could not impair or interfere with the assessment of the proper measure of damages in the District Court.

In discussing the effect of the possible alternative conclusions which might be reached by the two courts Judge Palmer aptly set forth the situation as follows [Tr. p. 158]:

> "If the Federal court, in action No. 2454-B Civil, should hold that possession of the personal property never was lawfully taken from the plaintiff, no judgment in condemnation would ensue, and plaintiff would leave the Federal court with no compensation whatsoever for the damage claimed to have been suf-

fered from the acts of Federal officials thus held to have acted unlawfully.

"If the Federal court, in action No. 2454-B Civil, should hold that possession of the personal property was not lawful prior to the filing of the pleading titled a 'First Amended Complaint,' but became lawful at that time, the court would be powerless in that action to do anything about the unlawful possession previous to that date. Although in condemnation a property owner is supposed to receive full compensation for the property taken and for the damages suffered from the taking, the damages thus embraced are only those that flow from the lawful taking. They do not include injury suffered from prior unauthorized and unlawful acts of public officials. Hence, in the event of the possibility here being considered, the Federal court could not give plaintiff any relief for an element of damage claimed to have been suffered and claimed to be substantial.

"If the Federal court should decide that the taking of the personal property was lawful in the first instance and that thereafter the holding of possession against the plaintiff has been lawful, and if such a decision should follow a judgment of this court against the plaintiff, plaintiff would stand before the Federal court as the one to be compensated for the taking of the property. No difficulty or entanglement of status would result from the two trials.

"If prior to such a judgment of the Federal court, this court were to deliver a judgment in plaintiff's favor against the Union Oil Company of California, such judgment of this court would be founded on one of two theories: 1. That the taking of possession by federal officials was unlawful and the holding of possession since has been unlawful. In such a case, the judgment of this court, except for the element of

damages, would be in the alternative. If the defendant should pay the adjudicated value of the property rather than return it, or if judgment for such value should be satisfied by execution, the title to the property would pass to defendant. The Union Oil Company of California then would stand before the Federal court as the party to be compensated for the property. No entanglement of status would obstruct the orderly proceedings of that court. As there is no likelihood of defendant returning the property to the plaintiff so long as the Federal action pends, we need not spend time on that possibility.

"2. If this court should hold that the taking of the property was unlawful in the first instance, but became lawful when the 'First Amended Complaint' was filed in the Federal action, it might pursue either of two courses, depending on how it viewed the law. 1. It might regard the present factual status as a complete defense to replevin, and award only damages suffered by plaintiff from the date of the taking to the date of the filing of the amended pleading. In that case, plaintiff would stand before the Federal court as the one to be compensated for the property, and no entanglement of status would obstruct the orderly proceedings of that court. 2. It might find against the defendant, concluding that if defendant had not retained the personal property, that property would not have remained on the land, and no occasion for filing the amended pleading would have existed. So viewing the matter, the court might hold that the defendant had converted the property, and as defendant would not be able to redeliver, an alternative judgment would be useless. This court then would give plaintiff judgment for damages and for the value of the property. The title to the property would be vested in defendant; and defendant then

would stand before the Federal court as the one to be compensated. No entanglement of status would obstruct the orderly proceedings of that court.

"For the reasons that I have indicated, I hold that the duty of this court is to try the action and that a serious injustice might be done to plaintiff to deny to it the day in court to which it appears to be entitled. I do not consider it necessary to deal with certain other, and perhaps more 'technical,' rules, which also may be obstacles to the pleas in bar and abatement."

It is thus seen that there is no eventuality in respect to the possible decisions which might be rendered by the state court in the actions now sought to be enjoined or by the federal court in the condemnation action which will impair or interfere with the orderly proceedings of the District Court and the awarding of proper damages to the parties entitled thereto.

It necessarily follows that the injunction should have been denied.

(2) It No Doubt Will Be Contended That Appellants Are Estopped by Their Conduct From Maintaining the State Actions.

An examination of the Amended Answer of Treasure Company to the First Amended Complaint [Tr. pp. 49, 50 and 51] and the Answer of Appellant Samarkand Oil Company to the First Amended Complaint [Tr. pp. 47-48], will show that each alleges that said personal property "was unlawfully taken by the United States of America, Reconstruction Finance Corporation, Defense Plant Corporation, and their agents."

The prayer to each answer is:

"(1) That the above entitled action be dismissed;

(2) That in the event that said action is not dismissed as to real or personal property, and a decree of condemnation is ordered, that plaintiff be ordered to pay damages."

We do not want to have any misapprehension on the part of this Court as to our position.

We say that as to the personal property the District Court had no jurisdiction to condemn such personal property or to order payment for its taking, or to order immediate possession, until there was filed in the District Court a condemnation action seeking to condemn personal property.

Even if Reconstruction Finance Corporation had an intent to take personal property when the original suit was filed, such intent did not give Reconstruction Finance Corporation or Defense Plant Corporation the right to take such personal property until two things happened: (1) Reconstruction Finance Corporation determined the necessity of taking and directed the property to be taken, and (2) a condemnation suit was actually filed to condemn such property.

Until such two things happened the taking of possession by the Marshal and by Union Oil Company was unlawful.

No doubt the Court's attention will be called to the order of Judge Beaumont for immediate possession. It is to be found, beginning on page 14 of the Transcript in this Appeal. It will be noted this applies only to real property.

As the Reconstruction Finance Corporation had not adopted a resolution for taking anything but land, appellee had no right to file any suit for anything but land and did not do so.

The Court was without jurisdiction to entertain any suit to condemn personal property, until there was first a resolution by Reconstruction Finance Corporation authorizing its taking.

The aforesaid language merely directed that service be made, by posting the order for immediate possession upon the derricks and tanks upon the land.

But if this order should be construed to be an order for immediate possession of personal property, it would be utterly void, for said District Court had no jurisdiction to order immediate possession of personal property, until a suit seeking its condemnation was filed.

(f) Defendant Treasure Company Having the Right to Remove Improvements Put on the Land Covered by Its Lease, It Was Not Entitled to Recover Compensation for Such Improvements in This Condemnation Action, Until the Supplemental or Amended Complaint Was Filed.

Not only are the appellants TREASURE COMPANY and SAMARKAND OIL COMPANY granted the right by the lease and their respective subleases to remove within three months after the termination thereof any of the derricks, machinery, rigs, pipes, pumping stations or other improvements belonging to or furnished by the lessee or sublessee as stated in the affidavit of G. DE BRETTEVILLE [Tr. pp. 184, 185], filed in said proceedings, but by the terms of Paragraph 25 of the Fletcher lease to TREASURE

COMPANY covering Lots 9, 10 and 11 of Block 33, Tract 9809 and upon which Treasure Well No. 8 is located and upon which practically all of the personal property sought to be recovered by TREASURE COMPANY in the State Court Action No. 505-967 is located, requires that the lessee shall remove all rigs, machinery and other property, and in so far as possible, fill all sump holes and other excavations within six months after the termination of the lease. Under these provisions of the lease and respective subleases under which the defendants were operating at the time of the commencement of this action it cannot be contended that the equipment placed on the premises by these defendants became such an integral part of the leasehold as to require the Government to compensate these defendants for the taking of such equipment unless and until such time as such personal property is properly made the subject of an action in condemnation.

In *In re Acquisition of Certain Property on North River,* 103 N. Y. Supp. 908, it was held that while the defendant tenant in a condemnation proceeding is entitled to receive the reasonable value of the machinery installed by him which had become a part of the building but that such tenant is not entitled to be compensated for such machinery as can be readily removed and would have a substantial value disconnected from the building.

It follows that the appellants herein are not entitled to be compensated in the above entitled condemnation action for the value of the personal property illegally taken by the UNITED STATES MARSHAL and delivered to UNION OIL COMPANY.

(g) The Provisions of Section 265 of the Federal Judicial Code (28 U. S. C. A. 379) Renders the Granting of the Injunction in This Case Erroneous, an Abuse of Discretion, and a Violation of Established Principles of Law, and Therefore, Said Order Refusing to Vacate Said Injunction Should Be Reversed.

Section 265 of the Judicial Code (28 U. S. C. A. 379) reads as follows:

> "Section 379. (Judicial Code, section 265.) Same; stay in State Courts. The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. (R. S. Section 720; Mar. 31, 1911, c. 231, Section 265, 36 Stat. 1162.)"

The only exceptions, save one, to the clear and positive language of Section 265 of the Judicial Code, since its adoption in 1793, have been raised by express statutory enactments, namely, by the Bankruptcy Acts; The Removal (of actions) Acts; Limitation of Shipowners Liability Act; The Interpleader Act; and the Frazier-Lemke Act, none of which apply in the case at bar.

The one exception, which was not by Congressional Act was "imbedded in number 265 by judicial construction" in the so-called *"res"* cases.

> *Toucey v. New York Life Insurance Co.*, 314 U. S. 118, 139, 86 L. Ed. 100, 108.

In that case it was held that the doctrine of the *"res"* exception had its roots in the same policy from which the rule of Section 265 sprang, that is, the necessity of eliminating friction between the Federal and State Courts,

and was a firmly established doctrine when Section 265 was enacted, and that it should not be extended further, and had no application to *"non-res"* cases, actions which were not *in rem.*

In *Southern Railway Company v. Painter,* 314 U. S. 155, 86 L. Ed. 116, the Supreme Court extended this line of authority and held that Section 265 of the Judicial Code prevented a Federal Court from enjoining State Court action, in personal actions, even in aid of previously instituted litigation in the Federal Court. In that case the respondent brought an action in 1939 against the petitioner in the Federal District Court for the Eastern District of Missouri to recover damages under the Federal Employer's Liability Act, for the wrongful death of her husband while employed on petitioner's railroad between points in Tennessee and North Carolina. While this action was pending, petitioner filed a bill in the Chancery Court of Knox County, Tennessee, to enjoin petitioner from proceeding in the said Federal Court. An injunction was issued and became final. The respondent filed a "Supplemental Bill" in the Federal Court to enjoin the proceedngs in the State Court. The Federal District Court issued the injunction and was sustained by the Circuit Court for the Eighth Circuit (117 F. (2d) 100). The case went to the Supreme Court of the United States on writ of certiorari, and the lower courts were reversed, for the reason that their decisions violated the provisions of Section 265 of the Judicial Code (28 U. S. C. A. 379). At page 159 of the decision (86 L. Ed. 118), it is said:

> "The restrictions of Section 265 upon the use of the injunction to stay a litigation in a State Court

confine the district courts, even though such an injunction is sought in support of an earlier suit in the Federal Court."

The applicability of the above exception for Section 265 of the Judicial Code to actions *in rem* only, and not to personal actions, was recognized in these very condemnation proceedings by Judge McCormick in his decision above referred to.

62 F. Supp. 1017, 1020(3).

The State Court actions 505-967 and 505-968 are not *in rem* so far as the elements of damages for the wrongful taking of the personal property, its wrongful detention and deterioration during such detention, are concerned. Therefore, not being actions *in rem*, Section 265 of the Judicial Code applies, and any injunction issued by the Federal District Court restraining the prosecution of the State Court action is improper and contrary to law, even though it may be in aid of previous federal litigation.

Conclusion.

In conclusion we submit that Judge Beaumont erred in failing to grant the motion of appellant to vacate and set aside the temporary injunction theretofore granted. The record discloses that the petition for an injunction was under submission for many months prior to the order granting the injunction. This ruling was directly contrary to the ruling of Judge McCormick on a similar motion. Thereafter appellants sought to have said order granting such injunction vacated and set aside. We sub-

mit that the Judge clearly erred in failing to do so for the following reasons:

When the suit was filed it sought to condemn land only. This was pursuant to the resolution of Reconstruction Finance Corporation to take land, and all proceedings in said action involved only land. Notwithstanding such fact, the United States Marshal, under a decree for immediate possession, which only authorized him to take land, did take into possession personal property. As pointed out by Judge Palmer and by Judge McCormick this was entirely outside the power of the Marshal. If Judge Beaumont had directed the taking of personal property it would have been a void order and beyond the jurisdiction of the Court, because Reconstruction Finance Corporation, which is the only corporation authorized to determine the necessity for taking, determined only that it was necessary to take land. Union Oil Company of California took the personal property, unlawfully seized by the Marshal, and retained it from on or about September 28, 1942, and no action was taken by Reconstruction Finance Corporation to authorize the taking of the personal property, or the filing of the suit therefor, until October, 1943. During that entire time the personal property was in the possession of Union Oil Company of California who, although claiming to act as an agent of the Government, had no lawful right to retain it, because no Governmental Agency, which it claimed to represent, had a right to retain it. Union Oil Company unlawfully refused to return said property to appellants upon demand.

Appellants are California corporations and Union Oil Company of California is a California corporation, and the Superior Court of Los Angeles County had jurisdic-

tion to try said cause. It is to the advantage of appellants to file said cause and to have the issue determined in the State Court because the United States District Court has no jurisdiction to award damages for such unlawful taking and detention of property. The jurisdiction of the District Court in the condemnation suit is limited to the awarding of damages for property lawfully taken. If the injunction continues in effect, the result will be that in the condemnation suit appellants will be compensated for the value of the property when it was first lawfully taken and withheld, to wit, January 12, 1944, the date of the filing of the Amended Complaint, together with interest thereon from such date. The property greatly depreciated in value between September 28, 1942 and January 12, 1944, during all of which time the property was exposed to the elements. If appellants are prevented from trying the State Court action, the District Court will not be in a position to compensate appellants for the value of the property at the time it was unlawfully taken, nor will they be entitled to interest from the date of the actual seizure. However the State Court does have jurisdition to award appellants damages for such unlawful taking and detention. Under such circumstances the Court was guilty of an abuse of discretion in granting the temporary injunction and in refusing to set it aside.

This appeal is not taken merely because of an arbitrary desire on the part of appellants to try said cause in the State courts. They feel that by the unlawful conduct of the Government and of Union Oil Company they have been deprived of substantial rights, which can only be relieved by a judgment of the only Court which can grant them adequate relief.

It is obvious that the Government recognizes the fact that it erred in taking possession of the personal property, because it has attempted by Paragraph VIII of the Amended Complaint to cause the District Court and this Court to believe that the resolution of September 18, 1942 was sufficient to authorize the taking of the personal property, for it alleges as part of said paragraph:

> "That on September 18, 1942, said Reconstruction Finance Corporation, by a resolution duly adopted by its Board of Directors, resolved and determined that it was necessary for war purposes that the property, real, personal, and mixed, herein described, be acquired by condemnation, and that in connection therewith, the immediate right to occupy, use and improve said property be acquired." [Tr. p. 41.]

This pleading attempts to plead the legal effect of the resolution of September 18, 1942. However an examination of the aforesaid resolution of September 18, 1942 which is attached as Exhibit "A" to the Amended Complaint, and will be found at pages 77 and 78 of the Transcript, will clearly demonstrate that the allegation contained on page 41 was absolutely untrue. As a matter of fact the first mention of personal property is made in the resolution adopted in October, 1943.

The District Court had no authority or jurisdiction to order the taking of immediate possession of the personal property, until January 12, 1944 nor did it attempt to do so. While some decisions have held that it is not necessary that a formal order be made, still the resolution, which is the only authority for taking possession of personal property was adopted in October, 1943 and the right to take said personal property first arose on January

12, 1944, the date of the filing of the Amended Complaint first mentioning personal property. Therefore the taking and detention of the personal property prior thereto was wholly unlawful.

We respectfully submit that the Court should promptly reverse the order of Judge Beaumont refusing to set aside the injunction and permit appellants to proceed with their actions in the State Court to recover damages for the unlawful taking and withholding of the personal property.

Respectfully submitted,

BODKIN, BRESLIN & LUDDY, and
E. E. HITCHCOCK,
By HENRY G. BODKIN,
Attorneys for Appellants.